2005 WL 4858613 (Miss.Cir.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Mississippi.
First Judicial District
Hinds County

The Estate of Lovie FANCHER, by and through Carrol Fancher, Individually and as Personal Representative of the Estate of Lovie Fancher, and for the use and benefit of the wrongful death beneficiaries of Lovie Fancher, Plaintiff,

v.

AURORA HEALTHCARE, LLC; Aurora Cares, LLC; Lakeland Nursing and Rehabilitation, LLC; James C. Landers, Abby W. Little, Unidentified Entities 1 through 10 and John Does 1 through 10 (as to Lakeland Nursing and Rehabilitation Center), Defendants.

No. 251-04-820 CIV.
May 16, 2005.

Plaintiff's Response to Defendants Aurora Healthcare, LLC; Aurora Cares, LLC; Lakeland Nursing and Rehabilitation, LLC; and Abby W. Little's Motion to Dismiss, to Compel Arbitration and to Stay Discovery

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Plaintiff, by and through counsel of record, Wilkes & McHugh, P.A., submits the following Response to Defendants' Motion to Dismiss, to Compel Arbitration and to Stay Discovery. Plaintiff also requests this Court to extend the page limit under Uniform Circuit and County Rule 4.03(4), so Plaintiff can respond fully to Defendants' motion.

BACKGROUND

Lovie Fancher was a resident of Lakeland Nursing and Rehabilitation Center, a skilled nursing facilty located at 3680 Lakeland Lane, Jackson, Mississippi, 39216, from February 23, 2004 until April 12, 2004. During her residency, Lovie Fancher suffered horrible and preventable injuries, including malnutrition, dehydration, weight loss, skin tears, staph infections, pneumonia, unexplained injuries, disfigurement, unnecessary physical suffering and mental anguish, and death. As a result of these injuries, Lovie Fancher required medical attention and hospitalization, and she ultimately died on April 13, 2004.

On or about August 20, 2004, Plaintiff filed a Complaint asserting several causes of action against all Defendants, including negligence, gross negligence, medical malpractice, malice, fraud, breach of fiduciary duty, and wrongful death. Plaintiff filed her First Set of Interrogatories and First Requests for Production to Defendants on February 21, 2005, and her Second Set of Interrogatories and Second Requests for Production on May 13, 2005.

On March 30, 2005, Defendants Aurora Healthcare, LLC; Aurora Cares, LLC; Lakeland Nursing and Rehabilitation, LLC; and Abby W. Little filed the instant Motion to Dismiss, to Compel Arbitration, and to Stay Discovery. In their motion, Defendants seek to enforce the terms of the Resident and Facility Arbitration Agreement attached to the Admission Agreement on Lovie Fancher's behalf dated February 23, 2004. The Arbitration Agreement provides that:

> any and all claims, disputes, and controversies... arising out of, or in connection with, or relating in any way to the Admission Agreement or any service or health care provided by the Facility to the Resident shall be

> resolved exclusively by binding arbitration to be conducted... in accordance with the National Arbitration Forum Code of Procedure, which is hereby incorporated into this Agreement.

The Arbitration Agreement further provides that:

> It is the intention of the parties to this Agreement that it shall inure to the benefit of and bind the parties, their successors, and assigns, including without limitation the agents, employees and servants of the Facility, and all persons whose claim is derived through or on behalf of the Resident, including any parent, spouse, sibling, child, guardian, executor, legal representative, administrator, or heir of the Resident.

See p. 29 of Admission Agreement.

Given the Mississippi Supreme Court's recent decision in *Pitts v. Watkins*, No. 2004-CA-0062-SCT (April 14, 2005), it is clear that the arbitration clause in this matter cannot be enforced because it is unconscionable. It requires the nursing home resident to arbitrate claims while the Facility is permitted to litigate its claims in a court of law.

The standard for determining the validity and enforceability of an arbitration clause is by now well known:
In determining the validity of a motion to compel arbitration under the Federal Arbitration Act, courts generally conduct a two-pronged inquiry. The first prong has two considerations: (1) whether there is a valid arbitration agreement and (2) whether the parties' dispute is within the scope of the arbitration agreement.

Under the second prong, the United States Supreme Court has stated the question is "whether legal constraints external to the parties' agreement foreclosed arbitration of those claims."

Pre-Paid Legal Services, Inc. v. Battle, 873 So. 2d 79, 83 (Miss. 2004) citing *East Ford, Inc. v. Taylor*, 826 So. 2d at 713 (Miss. 2002). Pursuant to 9 U.S.C. § 2, an arbitration agreement is enforceable "save upon such grounds as exists at law or in equity for the revocation of any contract." It is clear that in matters regarding the enforceability of an arbitration agreement, a party may assert common law contract defenses such as fraud, duress or unconscionability may be applied to invalidate arbitration agreements. *See Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681 (1996).

I. *PITTS V. WATKINS* CONTROLS THIS CASE.

In *Pitts v. Watkins*, No. 2004-CA-0062-SCT (April 14, 2005), the Mississippi Supreme Court held that the trial court erred for compelling arbitration because the arbitration clause and the limitation of liability clause found in a home inspection agreement were substantively unconscionable. The Court noted that the arbitration clause was substantively unconscionable because it allowed the defendant to pursue her claims in court while requiring the plaintiffs to arbitrate any claims they may have against the defendant. For example, the contract in *Pitts* stated that "should you fail to timely pay the agreed upon fee(s), you shall be responsible for paying any and all fees associated with collection, including but not limited to administration costs, attorney's fees and costs of litigation." With regard to this clause, the Court stated:
These terms unreasonably favor Watkins. The language included in the clause, "(unless based on payment of fee)" maintains Watkins's ability to pursue a breach by Pitts in a court of law, while Pitts is required to arbitrate any alleged breach by Watkins. This arbitration clause is clearly one-sided, oppressive, and therefore, substantively unconscionable.

Id.

Likewise, the Admission Agreement provides for the arbitration of all claims and disputes, but, at the same time, states:

> In the event the Facility refers the Resident's account to an attorney, collection agency or other third party for collection, the Resident and Designated Representative agree to reimburse, indemnify and hold the Facility harmless for any and all costs of collection, including, without limitation, attorney's fees.

See p. 4, § 4.2 of Admission Agreement.

This contract language clearly makes the arbitration requirement one sided and, in light of the Supreme Court's holding in *Pitts v. Watkins*, substantively unconscionable and unenforceable.

II. THE COURT MUST DECIDE WHETHER AN AGREEMENT TO ARBITRATE EXISTS.

It is clear beyond dispute that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which she has not agreed so to submit." *A.T.&T. Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648; 106 S. Ct. 1415, 1418 (1986). "[B]ecause arbitration is a matter of contract, where a party contends that it has not signed any agreement to arbitrate, the court must determine if there is an agreement to arbitrate before any additional dispute can be sent to arbitration." *Will-Drill Resources, Inc. v. Samson Resources Co.*, 352 F.3d 211, 218 (5th Cir. 2003); *see, also, Fleetwood Enterprises, Inc. v. Gaskamp*, 230 F.3d 1069 (5th Cir. 2002); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920 (1995). "Where the very existence of any agreement is disputed, it is for the courts to decide at the outset whether an agreement was reached, applying state-law principles of contract.... We reject the argument that where there is a signed document containing an arbitration clause which the parties do not dispute they signed, we must presume that there is a valid contract and send any general attacks on the agreement to the arbitrator." *Will-Drill Resources, Inc. v. Samson Resources Co.*, 352 F.3d at 218.

In *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474-75, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989), the US Supreme Court stated that "the FAA does not confer a right to compel arbitration of any dispute at any time"; it confers only the right to obtain an order directing that "arbitration proceed in the manner provided for in [the parties'] agreement." *See* 9 U.S.C. § 4 (directing that the trial court is to order arbitration "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue").

Both the courts of Mississippi and the United States Supreme Court have required that purported waivers of the right to trial by jury be "clear and unmistakable." Accordingly, parties cannot be forced into binding arbitration on claims that they did not agree to arbitrate. In deciding whether to grant a motion to compel arbitration, the threshold issue for the court is whether the parties have entered into a written agreement to arbitrate. Indeed, a party moving to compel arbitration must prove (1) the existence of a valid agreement to arbitrate and (2) a dispute that falls within the scope of the agreement. *See Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 214 (5th Cir. 2003); *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003); *American Medical Technologies, Inc. v. Miller*, 149 S.W.3d 265 (Tx Ct App(4th Div-Houston) 2004).

In *Will-Drill Resources, Inc. v. Samson Resources Co.*, 352 F.3d 211 (5th Cir. 2003), the Fifth Circuit held that when the "very existence of a contract is in issue," courts have authority and responsibility to decide the matter. *Id.* at 218. This holding is in line with other Circuits' holdings that defenses which attack the very existence of the agreement, such as forgery and lack of authority, must be resolved by the court, not the arbitrator. *See, e.g., Opals on Ice Lingerie v. Body Lines Inc.*, 320 F.3d 362, 370 (2d Cir.2003) (forgery); *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 591-92 (7th Cir.2001) (lack of authority); *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 111-12 (3d Cir.2000) (lack of authority).

III. THE ARBITRATION AGREEMENT WAS NOT PROPERLY EXECUTED

A. Carrol Fancher Did Not Have Power of Attorney For Lovie Fancher

Carrol Fancher signed the Admissions Agreement on behalf of Lovie Fancher as "POA -- Daughter." However, Carrol Fancher did not have Power of Attorney for Lovie Fancher. The Power of Attorney document states:

> This Power shall only become effective upon a determination of my incapacity, as determined in accordance with Article III of this Durable Power of Attorney for Financial Decisions.

See Article I, ¶ 4, Durable Power of Attorney for Financial Matters, Exhibit "A."

Article III of the document clearly shows that a determination of incapacity was never made:

> "Incapacity" shall be established by certification of two physicians licensed to practice in the state of MS (or in the state which is my residency on the date of the incapacity), that I am unable to care properly for myself or my property, or by a decree of a court of competent jurisdiction that I am unable to care for myself or my property.

See Article III, ¶ 1, Durable Power of Attorney for Financial Matters, Exhbit "A."

Lovie Fancher was never determined to be incapacitated by two physicians licensed in Mississippi or by a decree of a court of competent jurisdiction, thus, the Durable Power of Attorney for Financial Matters never became effective by its own terms. *See* Affidavit of Carrol Fancher, Exhibit "B."

Moreover, the power that Carrol Fancher could have had consisted only of "powers that may be necessary for the management of my property." Such powers are listed in Article II of the document, and all involve actions in regard to the management of real property. Nowhere in the document does it suggest that Carrol Fancher could have the power to contract away the rights of Lovie Fancher, including her constitutional right to a trial by jury. Thus, Lovie Fancher and her heirs are not bound to the Arbitration Agreement.

B. Carrol Fancher Did Not Have Requisite Authority to Bind Lovie Fancher, or Her Heirs, to Arbitration.

While the Admission Agreement purports to be among Lovie Fancher, Carrol Fancher and the Facility, Lovie Fancher did not sign the Admission Agreement. Instead, Carrol Facher signed the Admission Agreement as the "Responsible Party" for Lovie Fancher. There is no indication in Defendants' Motion as to how, why, or when Carrol Fancher was chosen by Lovie Fancher to be her Responsible Party. There is further no indication in Defendants' Motion or in the Admission Agreement that the Responsible Party is vested with any legal authority to bind the Resident.

Both the United States Supreme Court and the Mississippi courts have required analogous, heightened showings of authority when an agent is giving up important rights, specifically with regard to arbitration. *See Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 478, 109 S.Ct. 1248, 1255, 103 L.Ed.2d 488 (1989); *CUE Oil Co. v. Fornea Oil Co., Inc.*, 45 So. 2d 597 (Miss. 1950). The United States Supreme Court has recognized the right to access courts as a fundamental constitutional right preserved in the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment, the First Amendment right to petition the government for redress of grievances, and the Due Process Clause of the United States Constitution.

As testified by Carrol Fancher, she did not have any legal authority to bind her mother to the arbitration provisions and to waive Lovie Fancher's right to a jury trial or any other constitutional right. Moreover, her mother had not been declared incapacitated and her mother was not made aware of the provisions at the time the Agreement was executed to make any such decision. *See Affidavit of Carrol Fancher*.

Even if Lovie Fancher was, in fact, incapacited, without a formal determination, there are no Mississippi cases that specifically address the ability of a incapacitated nursing home resident to appoint an agent for the purpose of agreeing to arbitration in nursing home disputes, the California Court of Appeals addressed this issue in *Pagarigan v. Libby Care Center, Inc.*, 120 Cal. Rptr. 2d 892 (Cal. Ct. App. 2002). There, the nursing home resident had been admitted to the facility in a comatose state and remained in residence for nearly a year, during which time she developed pressure sores, became malnourished and dehydrated. The adult children of the resident brought a personal injury action and a wrongful death claim against the nursing home owners and operators. The defendants filed a petition to compel arbitration based upon two arbitration agreements signed by the resident's adult children. The trial court denied the petition to compel arbitration and the appellate court affirmed:

> As explained below, we have identified two independently adequate reasons for affirming the trial court's ruling: (1) defendants failed to produce any evidence Teri or Mary Pagarigan had authority to enter into an arbitration contract on behalf of their mother; and (2) defendants failed to provide any evidence they were entitled to seek enforcement of the arbitration agreements.

Id. at 894.

The *Pagarigan* court noted that the nursing home bore the burden of establishing a valid agreement to arbitrate, and the nursing home admitted that the resident had not signed the arbitration agreements. The nursing home further admitted that the resident was incompetent upon admission. Like the instant case, there was no durable power of attorney and no legal guardian appointed. In discussing the resident's incompetency upon admission, the court noted that "[i]t necessarily follows Mrs. Pagarigan lacked the capacity to authorize either daughter to enter into the arbitration agreements on her behalf. Consequently, no valid arbitration contract exists." *Id*.

The nursing home argued that because the adult daughters signed the arbitration agreements, they represented themselves as having the power to bind their mother to the arbitration documents. The court was not persuaded by this argument and cited long-standing agency principles:

A person cannot become the agent of another merely by representing herself as such. To be an agent, she must actually be so employed by the principal, or the principal intentionally, or by want of ordinary care, [has caused] a third person to believe another to be her agent who is not really employed by her. Defendants produced no evidence Mrs. Pagarigan had ever employed either of her daughters as her agent in any capacity. Nor did Defendants produce any evidence this comatose and mentally incompetent woman did anything which caused them to believe that either of her daughters was authorized to act as her agent in any capacity.

Defendants' second argument is equally lacking in merit. Defendants contend Teri and Mary Pagarigan had authority to bind their mother to an arbitration agreement merely by being their mother's next-of-kin. In support of this argument, Defendants cite [California Code section regarding informed consent]. Under subdivision (c) of the statute, the term "person with legal authority" includes the patient's "next-of-kin."

* * *

Defendants do not explain how the next-of-kin's authority to make medical treatment decisions for the patient at the request of the treating physician translates into the authority to sign an arbitration agreement on the patient's behalf at the request of the nursing home.... [D]efendants maintain that since the state conferred on Teri and Mary Pagarigan the authority to sign their mother's admission agreement, make medical treatment decisions on her behalf and enforce her rights as a nursing home patient "to argue neither have the authority to sign the arbitration agreement is counter-intuitive and inconsistent with legislative intent."

It appears to us just the opposite is true. The statutes and regulations cited by Defendants demonstrate that when the Legislature and the Department of Health Services wanted to confer authority on next-of-kin to take some action on behalf of a nursing

home resident they knew how to say so. It would indeed be counter-intuitive and inconsistent with legislative intent to hold that by failing to confer authority on the next-of-kin to bind a nursing home resident to an arbitration agreement, the Legislature, an administrative agency, intended to confer the very authority they withheld.

Id. at 894-95.

Similarly, in Mississippi, the burden is on the claimant to show the authority of the agent. See *CUE Oil Co. v. Fornea Oil Co., Inc.*, 45 So. 2d 597 (Miss. 1950). In this case, Defendants have failed to provide any proof that Carrol Fancher had the authority to bind Lovie Fancher to arbitration provisions. Carrol Fancher testified that she did not tell the Facility that he had a power of attorney. Furthermore, any assertion that she had the apparent authority to bind Lovie Fancher would fail. Addressing agency, the Mississippi Supreme Court wrote:

> It is the rule at common law that persons dealing with an agent must inquire as to her authority, and if the agent has no authority, the principal is not bound by her agreements, unless the principal either ratifies them, or so acts with reference to them as to constitute it a waiver or an estoppel.

Aetna Ins. Co. v. Singleton, 164 So. 13, 16 (Miss. 1935). With respect to apparent authority, the Mississippi Supreme Court wrote:

> [T]he principal is bound if the conduct of the principal is such that persons of reasonable prudence, ordinarily familiar with business practices, dealing with the agent might rightfully believe the agent to have the power she assumes to have.

McPherson v. McLendon, 221 So. 2d 75, 78 (Miss. 1968).

There is ample authority for the proposition that where an agent does not have authority to bind a party to an arbitration agreement, or where the party otherwise does not sign the agreement, the party cannot be bound by its terms. See *Chastain v. The Robinson-Humphrey Company, Inc.*, 957 F.2d 851 (11th. Cir. 1992); *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 478, 109 S.Ct. 1248, 1255, 103 L.Ed.2d 488 (1989); *Goldberg v. Bear, Stearns & Co.*, 912 F.2d 1418, 1419 (11th Cir.1990) (per curiam); *Cancanon v. Smith Barney, Harris, Upham & Co.*, 805 F.2d 998, 1000 (11th Cir. 1986) (per curiam); *Three Valleys Municipal Water District v. E.F. Hutton & Company, Inc.*, 925 F.2d 1136 (9th Cir. 1991); *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51 (3d Cir.1980); *N & D Fashions, Inc. v. DHJ Indus., Inc.*, 548 F.2d 722 (8th Cir. 1976); *Smith Wilson Co. v. Trading & Dev. Establishment*, 744 F.Supp. 14 (D.D.C.1990); *Ferreri v. First Options, Inc.*, 623 F.Supp. 427 (E.D.Pa.1985); *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648 (1986)(To require the plaintiffs to arbitrate where they deny that they entered into the contracts would be inconsistent with the "first principle" of arbitration that "a party cannot be required to submit [to arbitration] any dispute which she has not agreed so to submit."); *Sphere Drake Insurance Limited v. All American Insurance Company*, 256 F.3d 587 (7th Cir. 2001); *Sandvik AB v. Advent International Corp.*, 220 F.3d 99, 105-09 (3d Cir.2000); *N&D Fashions, Inc. v. DHJ Industries, Inc.*, 548 F.2d 722, 729 (8th Cir.1976); *Raiteri v. NHC Healthcare/Knoxville, Inc.*, No. 2-791-01, 2003 WL 23094413 (Tenn. Ct. App. Dec. 30, 2003).

Persons being admitted into facilities such as Lakeland Nursing and Rehabilitation Center are often incompetent. Defendants are well aware that they must ask for proof of either a durable power of attorney for health care, guardianship of the person or estate, or conservatorship, *or other court-recognized representative capacity* from anyone purporting to act on behalf of the person being admitted. Absent these documents, there is no reasonable basis for nursing home personnel to assume that any acts of a supposed agent are binding as to an incompetent principal. As recognized in the Admission Agreement, it is crucial to the enforceability of the Admission Agreement that the Responsible Party have authority to sign the Agreement. *See* p. 16 of Admission Agreement. Despite the boilerplate language that the Responsible Party has authority to bind the Resident, the only

evidence in this case is that Carrol Fancher did not have any legal authority to bind her mother. Because Carrol Fancher did not have authority to bind Lovie Fancher to the arbitration provisions, no such agreement existed.

Finally, this Court need not determine whether the Admission Agreement as a whole was validly executed because even if Lovie Fancher's daughter could act on her behalf, she could not bind her to an arbitration agreement. [1] A guardian cannot bind a ward to arbitrate disputes. See *Fort v. Battle*, 21 Miss. 133 (Miss. Err. & App. 1849). Furthermore, because all laws relative to the guardianship of a minor apply to a conservator, a conservator cannot bind a ward to an arbitration clause. See Miss. Code Ann. § 93-13-259 (all laws relative to the guardianship of a minor apply to a conservator.) Because neither a guardian nor a conservator can bind a ward to an arbitration agreement, logic then dictates that an agent cannot similarly bind her or her principal/ward. Therefore, no valid arbitration agreement exists and Defendants' Motion should be denied.

IV. THE ADMISSION AND ARBITRATION AGREEMENTS ARE ILLEGAL.

A. Agreement Violates the Mississippi Vulnerable Adults Act.

Plaintiff further submits that the arbitration clause violates the Mississippi Vulnerable Adults Act of 1986. The Mississippi Legislature passed the act with an eye towards protecting vulnerable adults from **abuse**, neglect or exploitation. See Miss. Code Ann. § 43-47-3. The Act defines a vulnerable adult as:

> A person eighteen (18) years of age or older or any minor whose ability to perform the normal activities of daily living or to provide for her or her own care or protection is impaired due to a mental, emotional, physical, or developmental disability or dysfunction, or brain damage or the infirmities of aging.

Miss. Code. Ann. § 43-47-5(m).

The Act also defines essential services as “those social work, medical, psychiatric or legal services necessary to safeguard a vulnerable adult's rights and resources and to maintain the physical or mental well-being of the person.” Miss. Code Ann. § 43-47-5(h). Additionally, any person who commits an act or omits the performance of any duty which contributes or tends to contribute to the deprivation of services which are necessary to maintain the mental and physical health of a vulnerable adult faces criminal penalties. *See* Miss. Code Ann. § 43-47-19.

There can be no doubt that Lovie Fancher was a vulnerable adult as defined by the statute. Likewise, there is absolutely no proof that the Defendants provided Lovie Fancher with all of the essential services, as that term is defined, necessary to safeguard her right to a jury trial. Because Defendants failed to provide legal services necessary to safeguard Lovie Fancher's constitutional rights and in fact, Defendants actively attempted to restrict that right through the use of an arbitration clause, a potential violation of the Mississippi Vulnerable Adults Act has occurred.

B. Agreement Violates Residents Rights Regulations

With regard to nursing home admission agreements, Mississippi Regulations provide,

> No agreement or contract shall be entered into between the licensee and the resident or her responsible party which will relieve the licensee of responsibility for the protection of the person and of the rights of the individual admitted to the facility for care, as set forth in these regulations.

Mississippi Minimum Standards § 404.3(b).

The Residents' Rights section of the regulations state that a nursing home resident:

> is encouraged and assisted, throughout her period of stay, to exercise her rights as a resident and as a citizen, and to this end may voice grievances, has a right of action for damages or other relief for deprivations or infringements of her right to adequate and proper treatment and care established by an applicable statute, rule, regulation or contract, and to recommend changes in policies and services to facility staff and/or to outside representatives of her choice, free from restraint, interference, coercion, discrimination, or reprisal

Id. at § 408.2(e)(emphasis added).

> is assured of exercising her civil and religious liberties including the right to independent personal decisions and knowledge of available choice. The facility shall encourage and assist in the fullest exercise of these rights.

Id. at § 408.2(p).

The federal regulations further provide that a nursing home must protect and promote the rights of each resident, including each resident's rights as a United States citizen. *See* 42 C.F.R. § 483.10(a)(1). These regulations clearly provide that nursing homes cannot infringe upon the rights of their residents. Moreover, the Exhibit D of the Admission Agreement lists the Resident Bill of Rights. Pursuant to the applicable regulations and the Admission Agreement, Defendants were required to encourage and assist Lovie Fancher in protecting and exercising his fundamental rights, including the right to bring a lawsuit against the nursing home if poor care is given. Yet, by including an arbitration provision in the Agreement that the Resident is not allowed to opt out of, Defendants attempt to illegally contract away the very responsibility the government requires of them.

C. The Arbitration Clause Constitutes Additional Consideration, In Violation Of Federal Law.

Mandatory arbitration clauses in nursing home admission contracts violate federal law by requiring additional consideration from the resident in exchange for admission to the nursing home. Where an individual is entitled to medical assistance through Medicare or Medicaid, a nursing facility must,

> not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan ..., any gift, money donation, or other consideration as a precondition of admitting ... the individual to the facility or as a requirement for the individual's continued stay in the facility.

42 U.S.C. § 1396r(c)(5)(A)(iii).

Furthermore, federal regulations provide as follows:

> In the case of a person eligible for Medicaid, a nursing facility must not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan, any gift, money, donation, or other consideration as a precondition of admission, expedited admission, or continued stay in the facility.

42 C.F.R. § 483.12 (d)(3) (emphasis added).

A resident's promise to pay his or her account is sufficient consideration in and of itself for admission to a nursing home. Requiring a resident to waive his or her constitutional right to a jury trial and to agree to indemnify the facility from its own actions before being admitted to the nursing home is additional consideration and is therefore illegal.

It is unquestionable that Mississippi considers the waiver of a right to be consideration. *See Estate of Lexie Louis Sadler v. Lee*, 98 So. 2d 863, 867 (Miss. 1957). Ms. Fancher provided consideration to Lakeland by agreeing to pay for services at the facility. Defendants' arbitration clause, indemnification and hold harmless provisions, qualify as additional consideration, and should be stricken.

D. The Arbitration Clause Does Not Bind The Wrongful Death Beneficiaries.

"Mississippi's wrongful death statute is based on the new cause of action theory. Under that theory, the statute creates a new cause of action that accrues at death in favor of the heirs listed in the statute." *In re England*, 846 So. 2d 1060, 1066 (Miss. Ct. App. 2003)(internal citations omitted). Because Mississippi's wrongful death statute creates a new cause of action, and the statute specifically sets forth who can recover as a wrongful death beneficiary, such a claim should be outside the scope of Defendants' arbitration clause, as such beneficiaries were not determined at the time the Admission Agreement was executed.

E. Agreement Violates the Mississippi Wrongful Death Statute.

The Arbitration Agreement provides that the arbitration provisions shall inure to the benefit of and bind the parties, and all persons whose claim is derived through or on behalf of the Resident. Part of Plaintiffs' claims against Defendants are brought under Mississippi's wrongful death statute. Miss. Code. Ann. § 11-7-13. The Mississippi Supreme Court has decided that causes of action created by the wrongful death statute are not part of a decedent's estate. *See Pannel v. Guess*, 671 So. 2d 1310 (Miss. 1996); *see also Partyka v. Yazoo Dev. Corp.*, 376 So. 2d 646 (Miss. 1979). The Mississippi Supreme Court's view of such claims became evident when it wrote:

> Mississippi's wrongful death statute creates a cause of action unknown to the common law, and we have held that the statute must be strictly construed. The wrongful death statute creates a new and independent cause of action in favor of those named therein.

Estate of Jones, Jr. v. Howell, 687 So. 2d 1171, 1178 (Miss. 1997).

This holding was consistent with the Court's previous statement that "wrongful death is a separate and distinct cause of action, which can be brought only by the survivors of the deceased." *Gentry v. Wallace*, 606 So. 2d 1117, 1119 (Miss. 1992). Because the wrongful death statute creates a separate and independent cause of action that is only maintainable by the survivors of the deceased, it is not possible for this claim to be arbitrated because no agreement to arbitrate exists that binds them.

While Mississippi has not addressed the issue of whether a wrongful death claim is arbitrable, the Colorado Court of Appeals has, stating, "Because Plaintiffs cause of action for wrongful death is wholly separate and distinct from any action her husband might have maintained, the arbitration provision is not applicable to her." *Pacheco v. Allen*, 55 P.3d 141, 143 (Col. Ct. App. 2001) *cert. Granted* 01SC744 (September 23, 2002). This Court should follow the lead of the Colorado Court of Appeals in not applying arbitration agreements to wrongful death claims because such claims are wholly separate and distinct from any action the decedent could have brought. To hold otherwise would require wrongful death beneficiaries to anticipate who would wrongfully kill a loved one and then contract in advance with that person or persons.

Nursing facilities operating in Mississippi are required to comply with state and federal law. These regulations were enacted to ensure that all nursing homes residents receive the care mandated by state and federal law. However, Defendants' Admission Agreement is wholly inconsistent with these regulations. Because Plaintiff is attacking the legality and existence of the arbitration agreement, it is an issue for this Court, and not the arbitrator, to resolve. *See Will-Drill, Res., Inc. v. Samson Res., Co.*, 352 F.3d 211, 218 (5th Cir. 2003). The Admission Agreement as written is illegal as a whole as it contains several provisions that violate state and federal law. Because the arbitration clause is merely a part of the larger agreement, and such agreement

is illegal, the arbitration clause no longer exists and cannot be enforced. Accordingly, Plaintiff requests that the Court deny Defendants' Motion to Compel Arbitration on the basis that no binding arbitration agreement exists.

V. THE ARBITRATION PROVISION IS UNCONSCIONABLE.

The Federal Arbitration Act (FAA) provides that arbitration clauses in commercial contracts "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. The usual defenses to a contract, such as fraud, unconscionability, duress, impossibility, and lack of consideration can all be used to invalidate an arbitration clause. Further, any defendant seeking enforcement of an arbitration provision must prove that the parties actually bargained over the arbitration provision or that it was a reasonable term considering the circumstances, in order to establish that there was a "mutuality of obligation." *See Pitts, supra; see also, Cash in a Flash Check Advance of Arkansas, LLC v. Spencer,* 348 Ark. 459 (2002).

Defendants' Admission Agreement is a mass-produced, pre-printed document with blanks for the names of the parties and a designation of the form number at the bottom. The arbitration clause was just one section of a thirty-four page, single spaced agreement. As in *Pitts, supra*, when the arbitration provisions of the Admission Agreement are read in conjunction with the other remedy and limitation of liability sections of the Agreement, the agreement to arbitrate bears all of the markings of a contract of adhesion, or a "standardized form offered to consumers ... on essentially a 'take it or leave it' basis, without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or service except by acquiescing to the form of the contract." *Buraczynski v. Eyring,* 919 S.W.2d 314, 320 (Tenn.1996) (*quoting* Black's Law Dictionary 40 (6th ed.1990)). The essence of adhesion is that the parties' bargaining positions and leverage enable one party to "select and control risks assumed under the contract." *See id.; see also* Black's Law Dictionary 318 (7th ed. 1999).

As a policy matter, adhesion contracts regarding health care should be unenforceable. While Mississippi courts have yet to address this issue, other states have. *See Howell v. NHC Health Care - Ft. Sanders, Inc.,* 2003 WL 465775 (Tenn. Ct. App. 2003), *Broemmer v. Abortion Services of Phoenix, Ltd.,* 173 Ariz. 148, 840 P. 2d 1013 (1992), *Obstetrics and Gynecologists William G. Wixted, Patrick M. Flanagan, William Robinson, Ltd. v. Pepper,* 101 Nev. 105, 693 P. 2d 1259 (1985), *Miner v. Walden,* 101 Misc. 2d 814, 422 N.Y.S. 2d 335, (1979), *Wheeler v. St. Joseph Hospital,* 63 Cal. App. 3d 345 (1976).

Because there is no Mississippi law on point regarding health care adhesion contracts, reviewing opinions from other states is instructive. In determining that hospital admission contracts were contracts of adhesion, the 4th District Court of Appeals for the State of California wrote:

> The would be patient is in no position to reject the proffered agreement, to bargain with the hospital, or in lieu of agreement to find another hospital. The admission room of a hospital contains no bargaining table where, as in the private business transaction, the parties can debate the terms of their contract. As a result, we cannot but conclude that the instant agreement manifested the characteristics of the so-called adhesion contract.

Wheeler, 63 Cal.App.3d at 357 (internal citations omitted).

Further, the Tennessee Court of Appeals has made the following statement when addressing the issue of enforcing arbitration agreements in nursing home admission contracts:

> [C]ourts are reluctant to enforce arbitration agreements between patients and health care providers when the agreements are hidden... and do not afford the patients an opportunity to question the terms or purpose of the agreement. This is so particularly when the agreements require the patient to choose between forever waiving the right to a trial by jury or foregoing necessary medical treatment.

Howell, 2003 WL 465775 at *3 (internal citations omitted) (emphasis added).

In light of the Mississippi Supreme Court's prior rulings in other areas, including *East Ford v. Taylor*, 826 So.2d 709 (Miss. 2002) and *Pitts*, which are consistent with the rulings of Tennessee courts regarding nursing home contracts, the following are the factors that a Mississippi court would likely hold must be considered to determine whether an arbitration provision in a nursing home Admission Agreement is an unenforceable adhesion contract. *See East Ford v. Taylor*, 826 So.2d 709 (Miss. 2002); *Pitts v. Watkins*, No. 2004-CA-0062-SCT (April 14, 2005); *see also*, *Howell v. NHC Health Care -- Ft. Sanders, Inc.*, 109 S.W. 3d 731 (Tenn. Ct. App. 2003).

"The common law ... subjects terms in contracts of adhesion to scrutiny for reasonableness." *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 600, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991)(Stevens, J., dissenting o.g.). Substantive unconscionability may be proven by showing the terms of the arbitration requirement are oppressive. The requirement that all claims be arbitrated is oppressive because Lovie Fancher was forced to give up her right to a jury trial in order to remain at the Facility. Moreover, the Facility did not waive *its* right to a jury trial. Instead, a review of the Admission Agreement reveals that no substantive rights are waived by the nursing home. While the nursing home's Admission Agreement attempts to deprive its residents of their day in court, it preserves for itself the ability to sue in court without having to arbitrate the validity or amount of the claim. The Admission Agreement provides for the arbitration of all claims and disputes, but, at the same time, states:

> In the event the Facility refers the Resident's account to an attorney, collection agency or other third party for collection, the Resident and Designated Representative agree to reimburse, indemnify and hold the Facility harmless for any and all costs of collection, including, without limitation, attorney's fees.

See p. 4, ¶ 4.2 of Admission Agreement.

Carrol Fancher risked Defendants discontinuing the much-needed care and treatment of Lovie Fancher if she did not sign the Agreement. Whether it was adequately explained to and understood by Carrol Fancher that the Agreement was not necessary for Lovie Fancher's continued residence at the Facility is disputed by Plaintiff. Moreover, provisions in the Agreement that the Resident or Responsible Party could seek counsel of an attorney were meaningless. In reality, Carrol Fancher was denied any reasonable opportunity to question the terms or purpose of the arbitration requirement. Because there is no meaningful remedy afforded to Lovie Fancher under the arbitration and limitation of liability provisions in the Admission Agreement, no valid agreement to arbitrate Plaintiffs claims exists and Defendants' Motion should be denied.

The circumstances surrounding the signing of the Arbitration Agreement render it unconscionable. As previously discussed, Defendants' admission agreement is a mass-produced, pre-printed document that does not name the parties and only refers to Lovie Fancher and Lakeland as "the Resident" and "the Facility", respectively. Also, the agreement was signed at a time when Lovie Fancher's family sought her admission to Lakeland. Then, the Agreement was signed by Carrol Fancher, Lovie Fancher's daughter, not by Lovie Fancher herself. Carrol Fancher risked Defendants discontinuing the much-needed care and treatment of her mother if she did not sign the Agreement. Admittedly, the Arbitration Agreement provides that execution of the agreement is not a condition of admission. However, whether this aspect of the Agreement was explained to and understood by Lovie Fancher or Carrol Fancher is in dispute. In reality, Carrol Fancher was denied any reasonable opportunity to question the terms or purpose of the Agreement. Because the foregoing circumstances coupled with the standardized format of the arbitration agreement render the agreement unconscionable, Defendants' Motion to Dismiss and to Compel Arbitration should be denied.

VI. DEFENDANTS BREACHED THEIR FIDUCIARY OBLIGATION TO LOVIE FANCHER

Lovie Fancher was admitted to Lakeland Nursing and Rehabilitation Center, Defendants' skilled nursing facility, in February, 2004. Defendants are engaged in the custodial care of **elderly**, helpless individuals who are chronically infirm, mentally

impaired, and/or in need of nursing care and treatment. While a resident at Defendants' facility, Lovie Fancher was both physically and mentally weak, causing her to be totally dependent upon Defendants to provide for his every need. Defendants had a fiduciary and confidential relationship with Lovie Fancher and her family. The relationship created an affirmative duty on Defendants to place Lovie Fancher's interests above their own and to not entice her or her family to waive her constitutional rights in order to receive medical care.

Under Mississippi law, while parties have a right to make contracts not prohibited by law, in matters affecting the business and civil rights, should the contract involve a fiduciary relationship of some kind, a court can relieve a person from the consequences of those acts. *See In re Estate of Sadler,* 98 So. 2d 863. Importantly, a contract entered with a fiduciary through which the fiduciary derives a benefit at the expense of the inferior party is presumptively fraudulent. *Gwin v. Fountain*, 126 So. 18 (Miss. 1930).

Mississippi courts have found fiduciary relationships to exist in situations that are much less compelling than the relationship at issue here. For example, in *Risk v. Risher,* 19 So. 2d 484 (Miss. 1944), the Mississippi Supreme Court clearly stated that a fiduciary relationship is not restricted to situations involving a trustee and beneficiary, principal and agent, or guardian and ward, but instead "applies to all persons who occupy a position out of which the duty of good faith ought in equity and good conscience to arise." *Id*. at 486. In *Parker v. Lewis Grocer Co.,* 153 So. 2d 261 (Miss. 1963), the Court held a fiduciary relationship to exist between a landlord and tenant:

> Wherever one person is placed in such a relation to another by the act or consent of that other, or by the act of a third person, or of the law, that she becomes interest for her, or interested with her, in any subject of property or business, she is in such a fiduciary relation with her that she is prohibited from acquiring rights in that subject antagonistic to the person with whose interest she has be come associated.

Id. at 276.

The relationship between Defendants and Lovie Fancher and her family was one of trust and confidence, and Defendants had a higher duty to affirmatively speak the truth to Lovie Fancher and his family because of Lovie Fancher's age and infirmities. The term "fiduciary relationship" is a broad term and includes "both technical fiduciary relations and those informal relations which exist wherever one person trusts in or relies upon another." *Hopewell Enter, Inc. v. Trustmark Nat'l Bank*, 680 So. 2d 812, 816 (Miss. 1996), *citing Lowery v. Guaranty Bank and Trust Co.*, 592 So. 2d 79 (Miss. 1991).

Whenever there is a relation between two people in which one person is in a position to exercise a dominant influence upon the other because of the latter's dependency upon the former, arising either from weakness of mind or body, or through trust, the law does not hesitate to characterize such relationship as fiduciary in character.

Madden v. Rhodes, 626 So. 2d 608, 617 (Miss. 1993) (*citing Hendricks v. James*, 421 So. 2d 1031, 1041 (Miss. 1982).

Federal regulations impose on nursing facilities a duty to care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident. Moreover, a nursing facility is required under federal law to protect and promote the rights of each resident. 42 CFR § 1396r. In fact, Mississippi law requires that upon admission to a facility, a resident:

> Is fully informed, as evidenced by the resident's written acknowledgement, prior to or at the time of admission and during stay, of these rights and is given a statement of the facility's rules and regulations and an explanation of the resident's responsibility to obey all reasonable regulations of the facility and to respect the personal rights and private property of other residents.

Miss. Min. Std. 408.2(a).

The regulations further provide that a resident:

> Is encouraged and assisted, throughout her period of stay, to exercise her rights as a resident and as a citizen, and to this end may voice grievances, has a right of action for damages or other relief for depravations or infringements of her right to adequate and proper treatment and care established by an applicable statute, rule, regulation or contract, and to recommend changes in policies and services to facility staff and/or to outside representatives of her choice, free from restraint, interference, coercion, discrimination, or reprisal.

Miss. Min. Std. 408.2(e).

Finally, the regulations provide that a nursing home resident:

> Is assured of exercising her civil and religious liberties including the right to independent personal decisions and knowledge of available choice. The facility shall encourage and assist in the fullest exercise of these rights.

Miss. Min. Std. 408.2(p).

Defendants had an affirmative duty to disclose all of the terms of the Agreement that worked to their benefit, including the arbitration clause. Defendants failed in this regard. Defendants' failure to disclose the arbitration provision as an attempt to limit their liability is fraudulent.

A Tennessee court eloquently examined a fiduciary's failure to disclose important information in a healthcare setting.
Fiduciary relationship, confidential relationship, constructive fraud and fraudulent concealment are all parts of the same concept. [T]he nature of the relationship which creates a duty to disclose, and a breach of [that] duty constitutes constructive fraud or fraudulent concealment, springs from the confidence and trust reposed by one in another, who by reason of a specific skill, knowledge, training, judgment or expertise, is in a superior position to advise or act on behalf of the party bestowing trust and confidence in him. Once the relationship exists 'there exists a duty to speak ... [and] mere silence constitutes fraudulent concealment.' In the common knowledge of man, patients submit themselves to the skills and arts, proficiency and expertise, of hospital personnel, once they become confined to the hospital. Indeed, most frequently, they have no real choice in the matter; they are physically and intellectually unable to do much more than submit and rely upon the medical superiority and ethical propriety of their attendants.

Shadrick v. Coker, 963 S.W.2d 726, 736 (Tenn.1998). Because Defendants fraudulently concealed from Ms. Fancher the true reasons for seeking her signature on the Admission Agreement, the Agreement is not valid. Moreover, it would be inequitable to allow them to benefit from their deceit.

VII. ANY STAY OF PROCEEDINGS SHOULD BE LIMITED TO THE PROPER DEFENDANTS.

In the event the Court decides to grant Defendants' Motion, it should only be granted as to the Defendants entitled to enforce the arbitration provisions. The Admission Agreement is clearly executed solely on behalf of Lakeland Health and Rehabilitation Center, LLC. While the Agreement provides at ¶ 23.7 that the Agreement shall "inure to the benefit of and bind the parties, their successors and assigns, including the agents, employees and servants of the Facility", there has been no proof presented that any of the moving Defendants, other than Lakeland Nursing and Rehabilitation Center, LLC, are entitled to enforce the terms of the Agreement. Thus, any Defendant attempting to benefit from the Agreement should be held to strict proof of such entitlement.

VIII. DEFENDANTS' MOTION SHOULD BE STRICKEN.

Defendants present their Motion as if the Court should decide the issues before it without the assistance of any fact finder. That is not the case. Whether Lovie Fancher, as well as Defendants, were parties to or otherwise subject to the arbitration clause must be the subject of an evidentiary hearing. Section 4 of the Federal Arbitration Act gives a consumer resisting an arbitration clause the right to:

> Demand a trial of such issue, and upon such demand the Court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure or may specially call a jury for that purpose. If the jury finds that no agreement in writing for arbitration was made or that there is no default for proceeding there under, the proceeding shall be dismissed.

CONCLUSION

Defendants seek to remove Plaintiffs claims against them from the justice system and submit these matters before an arbitrator. Plaintiff submits that for the reasons set forth herein, the no valid agreement to arbitrate Plaintiffs claims exists. Under the specific facts at issue here, it is unjust to enforce the arbitration clause submitted by Defendants.

WHEREFORE, Plaintiff submits that Defendants' Motion should be denied.

Footnotes

1 While Miss. Code Ann. § 41-41-211 allows for an adult child to act as a healthcare surrogate, such healthcare decisions are to be made in accordance with the patient's wishes or in their best interests when the wishes are unknown. There is no proof Lovie Fancher was willing to waive his right to a jury trial, nor could such a waiver be deemed in his best interests.

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